

In the Supreme Court

Appeal from the Court of Appeals
Fitzgerald, E.T., and Neff, J.T., and White, H.N.

BETTY SORKOWITZ, Individually and as Trustee
for the MORRIS AND SARAH FRIEDMAN
IRREVOCABLE TRUST, Betty Sorkowitz, Trustee
for the SARA FRIEDMAN TRUST, Betty Sorkowitz,
Personal Representative for the ESTATE OF
SARAH FRIEDMAN, BETMAR CHARITABLE
FOUNDATION, INC., JULIE SHIFFMAN, JANET
JACOBS,

Docket No. 126562

Plaintiffs-Appellees,

vs.

LAKRITZ, WISSBRUN & ASSOCIATES, P.C.,
a Michigan Corporation, GERALD LAKRITZ and
KENNETH WISSBRUN, joint and several,

Defendants-Appellants.

DEFENDANTS-APPELLANTS LAKRITZ, WISSBRUN & ASSOCIATES, P.C., GERALD LAKRITZ AND KENNETH WISSBRUN'S REPLY BRIEF

*** ORAL ARGUMENT REQUESTED***

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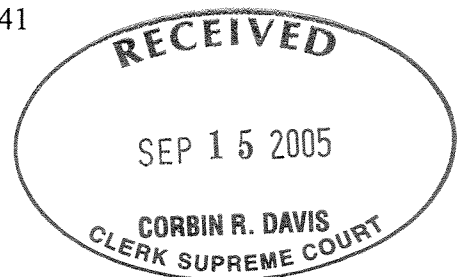


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I. The public policy roots of *Mieras v DeBona*, 452 Mich 278 (1996) are planted in client rights not lawyer immunity.

Plaintiffs argue that, as beneficiaries of the deceased client's trust, they should be able to question whether the client's "estate plan" was "deeply and expensively flawed." Appellee Brief, 12. Plaintiffs argue that the *Mieras* "four corners" rule should not apply "where all the beneficiaries are united in saying that everyone's interests have been diminished or harmed by bad draftsmanship." *Id*, 7. Plaintiffs say that the decedent's attorney client privilege should give way, and the client's file should be freely discoverable "to see if evidence exists as to whether an informed choice was made by the attorney or the client." *Id*, p 9.

Why should the fact that the living speak with one voice have the power to move this dispute off the four corners of the estate planning documents? The spectacle of disgruntled beneficiaries twisting testator intent for personal financial gain is as real in this case as it was in *Mieras*. The beneficiaries unanimously agree their preference was for them to get more money and for the taxing authorities to receive less. Their unanimity is a total nonsequitor. If extrinsic evidence of testator intent were to be admitted, as the Court of Appeals opinion permits, "the risk of misinterpreting" that intent "increases dramatically." *Mieras* at 304 quoting *Espinosa v Sparber*, 612 So2d 1378, 1380 (Fla, 1993). That risk is not diminished just because, unlike *Mieras*, apparently none of Sarah Friedman's beneficiaries are satisfied.

The public policy high ground lies with the defendant lawyer and his law firm and with this Court's opinion in *Mieras*. The opinion is no embarrassment to the profession, as plaintiffs suggest. Non-client suits against lawyers who draft estate plans that fail to please the survivors—be they one survivor or the whole bunch—cannot invade the attorney client relationship to evaluate their testator's intent or informed consent. Non-clients should not be

able to root around for evidence of intent, outside the estate planning documents, because the risk of failing to honor the decedent client's intent is too great.

Additionally, if the files of the attorney are laid open for the client's survivors to poke around looking for testator intent, the apparent confidentiality of an attorney's office becomes a trap. Estate planning clients entrust all manner of secrets to their lawyers. They have a right to expect that those secrets will be taken to their grave and beyond. A beneficiary unknown to a client's children may be an out-of-wedlock child. A grantor may never have trusted one of her children with money. She may have feared a grandchild beneficiary was a drug addict. If this Court were persuaded to scrap *Mieras* and let the beneficiaries have "at" it, the deceased client's right to keep confidential communications secret will be compromised.

Plaintiffs argue that allowing beneficiaries to successfully sue lawyers only if the estate planning documents show violation of the client's intent is bad public policy. That argument failed to persuade in *Mieras*. *Mieras* does not immunize lawyers from liability. *In the proper type of case*, and this is not one, the duties owed to the client and to the beneficiaries coalesce rather than compete. But as soon as the discourse moves off the face of the documents, client rights are potentially compromised because testator intent becomes debatable, except that death has silenced the only authoritative voice.

II. Plaintiffs are wrong that maintenance of this cause of action does no offense to *Mieras* and no offense to testator/settlor intent.

"[T]he only obligation owed by the attorney to named beneficiaries is to exercise the requisite standard of care in fulfilling the intent of the testator as expressed in..." here, the trust documents. *Mieras* at 301. In *Mieras*, this Court wrestled with the problem of how non-clients could sue a lawyer for malpractice, something not permitted outside the estate planning context,

and still assure that duties owed to non-clients do not compete with duties owed to clients. This Court decided that the lynchpin must be testator/settlor intent. If, as plaintiffs speculate, their discovery revealed “that defendants thought or assumed a Crummey Clause had been utilized in the estate plan” they are wrong that their cause of action would fall into place with “metaphysical certainty.” Appellee Brief, p 14. What the lawyers thought or assumed asks one of the exactly *wrong* questions. The search-- first, middle, last, in the documents and beyond them (even if the Court of Appeals was right to jettison *Mieras*) is only a search for Sarah Friedman’s intent.

Plaintiffs’ only response to the *Mieras* majority’s critique of certain cases relied on by Justice Levin, because those cases relied on extrinsic evidence even while decrying it, is to quarrel with this Court’s scholarship. Appellee Brief, p 9-10. Plaintiffs swap out a ridiculous definition of extrinsic “evidence,” as if the “four corners” rule should preclude consideration of the effect of statutes, e.g., the Rule Against Perpetuities in *Lucas v Hamm*, 15 Cal Reprtr 821; 364 P2d 685 (1961) and statutes governing the signing of wills in *Guy v Liederbach*, 459 A2d 744 (Pa, 1983). Statutes are not evidence, extrinsic or otherwise.

Plaintiffs say Crummey clauses are “not merely common or one of several acceptable alternatives,” but are “ubiquitous” and “essential” and argue that “there are some legal tools or options whose use is so basic that not to use them would require a special showing as to why.” *Id*, 10, 14. Whatever unexplained “special showing” plaintiffs are asking for, it would supplant testator intent with rank speculation.

Consider, as well, *what if* plaintiffs are correct in accusing that defendants should have insisted their client use a Crummey provision, even to the point (as alleged) of annually badgering Sarah Friedman until she did what was in the financial best interests of her beneficiaries? *What if*, mere allegations that defendants were negligent in failing to advise about

use of a Crummey means that these beneficiaries' lawsuit can go forward freed from the constraints of the *Mieras* "four corners" rule? What this lawsuit would look like is a far cry from plaintiffs' optimistic vision of "metaphysical certainties." It would be more aptly described as a metaphysical *uncertainty*. If Sarah Friedman was advised about the Crummey possibilities and she rejected them *no one can know* what she would have done *if* she had been advised in a different way. And if Sarah Friedman was not advised about the Crummey possibilities, *no one can know* what she would have done *if* she had been so advised.

Just about the only part of the Court of Appeals opinion that plaintiffs embrace (in addition to the result) is the panel's "diminution in the pot or pie left by the decedents" observation. The Court of Appeals majority thought what made *Mieras* inapplicable was the allegation that the estate paid more in taxes than it would have if the estate plan were differently structured. It came to that conclusion because it imagined a unanimity of interest that does not exist:

Here the interests of the deceased clients, the estate, and all the beneficiaries are aligned on the same side, and there is no danger that defendant attorneys will be wrongly held accountable to a third party for properly implementing the desires of their client. *Sorkowicz v Lakritz, Wissbrun*, 261 Mich App 642, 653 (2004).

The danger is present. The "interests" of the deceased clients, by which the majority must have meant the *intent* of the clients, cannot be presumed. Nothing in the estate planning documents support the intent the plaintiffs contend. And if the Court of Appeals gutting of *Mieras* stands, the danger exists that the defendants will be wrongly held accountable to the beneficiaries for implementing the desires of their client.

III. Some of what the plaintiffs are not saying is worth emphasizing.

The plaintiffs no longer claim that their expert had some expertise that mattered when he opined that Sarah Friedman's trust documents, stating she wanted "to provide for the secure future of" the various beneficiaries, betrayed testator intent to grant Crummey powers. The Court of Appeals was impressed with that affidavit, and quoted from it approvingly, even though it understood it was no proper evidence of testator intent. *Sorkowicz, supra* at 647. Plaintiffs have abandoned any reliance on the expert's affidavit.

In other words, plaintiffs now silently concede that if the "four corners" rule applies, the trial court was correct to grant summary disposition.

IV. Certain additional out of state cases should be added to the mix this Court considers.

On June 30, 2005, West Virginia joined the ranks of the states following the so-called "Florida/Iowa" rule adopted in *Mieras*. In *Calvert v Scharf*, ___ W Va ___, ___ SE2d ___, 2005 W Va LEXIS 77 (*Addendum A*), the West Virginia Supreme Court of Appeals ruled that beneficiaries may sue a will-drafting lawyer. But the proofs of their cause of action will be restricted to assure that lawyers, not in privity with the plaintiffs, will not be "exposed to 'a virtually unlimited potential for liability.'" *Calvert* at *27 quoting *Holsapple v McGrath*, 575 NW2d 518, 521 (Iowa, 1998). The *Calvert* Court restricted the class of plaintiffs to the "direct, intended and specifically identifiable beneficiaries" who "can be shown that the testator's intent, *as expressed in the will*, has been frustrated by negligence on the part of the lawyer so that the beneficiaries' interests under the will is either lost or diminished." *32.

Plaintiffs' suggestion that a "clear and convincing" standard for testator intent will be sufficient to address the significant interests protected by *Mieras* should be rejected. The

Connecticut case relied upon by plaintiffs, *Erickson v Erickson*, 246 Conn 359; 716 A2d 92 (1998) has not been adequately described in their brief. It is a wills contest case, not a legal malpractice case. The court held that the attorney's testimony should have been admitted. He testified that when he drafted a will on Thursday his client did not intend for it to be nullified by the client's wedding two days later. In that context, the court held that "the scrivener's error and its effect on the testator's intent" must be "established by clear and convincing evidence." *Id* at 98. The scrivener's error in that case mislead the testator into make a testamentary disposition that would not have occurred otherwise.

Michigan probate law also has instances where the "four corners" rule is not applied, for example where latent ambiguity is demonstrated. See *In re Estate of Kremlick*, 417 Mich. 237, 241 (1983). Though the *Mieras* "four corners" rule grows from probate law, more generally, probate law should not be expected to unerringly predict the results in legal malpractice cases. In legal malpractice cases, the public policy imperative of protecting client rights by reining in duties that will compete for a lawyer's attention are what is paramount. Retreat from *Mieras* by adopting a "clear and convincing" evidentiary standard would not adequately safeguard client rights.

Hattleberg v Norwest Bank Wisconsin, 271 Wis2d 225; 678 NW2d 302 (2004) affirmed on other grounds ___ Wis ___, 700 NW2d 15 (2005) is also relied upon by plaintiffs. Like *Erickson*, *Hattleberg* is also not a legal malpractice case. The drafting lawyer was sued in the case, but he settled before the case was tried. The defendant bank appealed a judgment awarding damages for its breach of fiduciary duty while managing an irrevocable trust. It had recommended inclusion of Crummey provisions. It had facilitated the decedent's annual gifts over an eighteen year period. It discovered the lack of Crummey provisions in the trust, but did

nothing other than (three years into the gifting period) sending a letter to the decedent's lawyer asking him "to modify the trust if possible." 678 NW 2d at 305. The Bank failed to notify its client of the omission. *Id* at 306. None of the issues presented here were raised or considered in either of the *Hattleberg* cases.

V. "The whole *Mieras* quandary" is not "avoided" (Appellee Brief, p 19) by permitting the Estate to sue the lawyers.

The plaintiffs contend that *Mieras*, which was unanimous in its ruling that the Estate was not a proper party plaintiff, "ignores several realities." Appellee Brief, 20. Cryptically and without any case authority, the plaintiffs suggest that *Mieras* is "avoided" if the Estate is accepted as a proper party plaintiff. Arguments raised without citation of authority should be ignored. Supreme Court Justice Voelker articulated the rule in *Mitcham v Detroit*, 355 Mich 182, 203 (1959):

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.


"While Justice Voelker's statement expresses the point in a most eloquent fashion, this has been the rule in Michigan long before his statement, and long after." *Wilson v Taylor*, 457 Mich 232, 243 n 13 (1998), citing *Arrand v Graham*, 297 Mich 559 (1941) and *Speaker-Hines & Thomas, Inc v Dep't of Treasury*, 207 Mich App 84, 90-91 (1994).

This Court has held that if a lawyer breaches a duty owed to an estate-planning client, the cause of action belongs only to the beneficiaries. "No one else has a sufficient interest, can show damage, or possesses the will" to pursue the claim. *Mieras, supra* at 290. The only "practical

effect” of an estate plan that fails to honor the testator’s intent, is that beneficiaries are deprived. *Id* at 297 quoting *Heyer v Flaig*, 74 Cal Rptr 255; 449 P2d 161 (1969). “[T]he Estate is not harmed in any way.” *Mieras* at 297.

The notion advanced by plaintiffs that the Estate can discover its way to standing to sue is completely untenable. The Court of Appeals majority opinion was clearly wrong when it ruled that: “The determination of the proper plaintiff or plaintiffs should be made after further discovery.” *Sorkowicz, supra* at 654.

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